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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

NO. 97-0065

ROBERT H. YOUNG, *ET AL.*,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Hilton Head Bank & Trust Company, N.A., *ET AL.*

REPLY OF PETITIONERS

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNTIED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Petitioners ("Young"), by and through the undersigned counsel, hereby respectfully file this Reply to the Response of the Federal Deposit Insurance Corporation ("FDIC"), dated "September, 1997" and received September 22, 1997.

The FDIC asserts that the package, delivered by a private courier on September 11, 1997, contained courtesy copies of its brief in *Hess v. FDIC*, which brief was referenced in the FDIC's Brief in *Young* and inadvertently omitted from the initial package,

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19 pp

and that the package contained additional copies of the FDIC's Brief in *Young*. (Response at p. 2).

Firstly, the package did not contain the *Hess* brief, nor has Young received any package containing the *Hess* brief. The package delivered by the courier on September 11th contained three (3) copies of the FDIC's Brief in *Young*. There was no cover letter, no certificate of service, and no other document in the package.

Secondly, if the purpose of the courier was merely to provide copies of the omitted *Hess* brief and if the FDIC thought it had already properly served three (3) copies of its *Young* brief, there would be no reason for the FDIC to provide "additional" copies of its *Young* brief.

Thirdly, neither package contained a cover letter, and the Certificate of Service does not reference the *Hess* brief. Yet, the FDIC asserts the error was "...noted on September 10...". The FDIC does not specify what prompted such discovery.

The FDIC asserts that the "fact" of service is reflected in the Certificate of Service. The Court recognizes that a meter date does not establish the date on which an item is actually deposited in the mail. (Supreme Court Rule 29.2.). Nor does a Certificate of Service. Nor is there any proof that the envelope was deposited with the United States Postal Service "**at** or **before** the time of filing". (emphasis added). (Supreme Court Rule 29.3.).

The FDIC does not dispute that the envelope was not directed to counsel at his "**proper post office address**", in accordance with Supreme Court Rule 29.3. (emphasis added). The cover page of

Young's Brief, prepared by a printer, does not reflect counsel's proper post office address. The signatory page of Young's Brief, prepared by counsel, does reflect counsel's proper post office address, as does his letterhead. Notably, these parties have exchanged correspondence and pleadings for more than five (5) years, during which time, the FDIC has consistently heretofore posted all such documents to counsel's proper post office address.

Finally, the FDIC states that Young did not "request earlier delivery of a copy of respondent's brief". (Response at p. 3). Young did not know the brief had been prepared until his counsel telephoned the Court on the 10th. Young is not required to request compliance with the rules. Young did not seek early delivery, only timely delivery.

As to the "courtesy" of the FDIC in providing copies of the *Hess* brief, Young would assert that any document provided to the Court for its consideration must necessarily be provided to opposing counsel on or before its submission to the Court. Service is a requirement, not a courtesy. The FDIC has asked the Court to consider the *Hess* brief. Had the *Hess* brief been served on the 11th, it would not have been timely served. However, to date, it has not been served at all. [Exhibit No. 1].

Moreover, Young would object to any consideration of the brief in *Hess*, as the FDIC's brief is neither authority nor properly part of the record in *Young*. Certainly, Petitioners are not required to respond to multiple briefs of the FDIC, including briefs in wholly

unrelated cases. This is the fourth time the FDIC has attempted to circumvent the rules and make improper argument.

On October 2, 1996, following oral arguments before the Fourth Circuit Court of Appeals and prior to the court's decision, the FDIC improperly submitted further argument in letter form to the court, citing to authority cited to extensively its brief and at oral argument and even arguing the facts in *Young*. Attached was the thirty-one (31) page Westlaw rendition of an opinion in a 1993 case, cited to by both parties in briefs and oral argument. [Exhibit No. 2 (attachment excluded)]. On October 10, 1997, Young objected. [Exhibit No. 3.].

On October 23, 1996, the FDIC again submitted improper argument in letter form to the court. Incredibly, the FDIC attached its entire brief in another matter to supplement this argument. [Exhibit No. 4 (attachment excluded)]. Again, Young made objection. [Exhibit No. 5].

On March 3, 1997, following the court's decision on the appeal and prior to its decision on Young's Petition for Rehearing, the FDIC yet again submitted improper argument in letter form. Attached were the FDIC's Statement of Policy and a ten (10) page Westlaw rendition of the *Atherton* decision. [Exhibit No. 6 (attachment excluded]. The court had not invited or requested any response to the petition. Young did not object for the reasons set forth in counsel's letter. [Exhibit No. 7]. Young's Petition was denied the same day.

As discussed herein, the FDIC does not appear to believe that it must follow the rules adhered to by other litigants. This is the fourth example of such conduct. Such conduct should not be condoned by this Court, but rather this Court should impose appropriate sanctions.

CONCLUSION

Based upon the foregoing, the *Rules of the Supreme Court of the United States*, the pleadings on file, and exhibits filed and served herein, the FDIC's Brief should be denied filing in the Court, denied submission to and consideration by the Court, and should be stricken in its entirety from the record of the Court. The FDIC's briefs in unrelated matters should be wholly disregarded.

September 22, 1997

George H. McMaster
Counsel of Record

Nelda T. Smyrl
Of Counsel

1400 Main Street, Fourth Floor
Post Office Box 7337
Columbia, South Carolina 29202
(803) 799-4499

Counsel for Petitioners

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

NO. 97-0065

ROBERT H. YOUNG, *ET AL.*,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Hilton Head Bank & Trust Company, N.A., *ET AL.*

AFFIDAVIT OF NELDA T. SMYRL

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNTIED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

PERSONALLY appeared before me NELDA T. SMYRL, who having been duly sworn, deposes and says:

1. That she personally received and opened the package from the FDIC, delivered by a private courier on September 11, 1997;

2. That the package contained three (3) FDIC Briefs in the *Young* case;

3. That the package did not contain a cover letter, a certificate of service, copies of the *Hess* brief, or any other

PLAINTIFF'S EXHIBIT 1

documents;

4. That neither of the packages, received on September 11, 1997, contained copies of the *Hess* brief; and

5. That, from the filing of the Petition for Certiorari to the present date, no other packages have been received from the FDIC containing copies of the *Hess* brief.

FURTHER, AFFIANT SAYETH NOT.

Nelda T. Smyrl
NELDA T. SMYRL

SWORN to and subscribed before me
this 22nd day of September, 1997

Andrea B Bailey (SEAL)
Notary Public for South Carolina

My Commission Expires: Sept. 20, 2005

FDIC
Federal Deposit Insurance Corporation
Washington, D.C. 20429

Legal Division

October 2, 1996

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OCT - 7 1996

BY OVERNIGHT COURIER

Mr. Bert Montague, Clerk
U.S Court of Appeals
for the Fourth Circuit
1100 E. Main St., Fifth Floor
Richmond, VA 23219

Re: Young v. FDIC, No. 95-1897

Dear Mr. Montague:

Pursuant to Fed. R. App. P. 28(j), the Federal Deposit Insurance Corporation ("FDIC") hereby submits pertinent and significant authorities which have come to counsel's attention after oral argument which was held on September 25, 1996.

The Panel asked whether the D'Oench doctrine had been applied outside of the lender-borrower context. In OPS Shopping Center, Inc. v. FDIC, 992 F.2d 306 (11th Cir. 1993), the Eleventh Circuit applied the doctrine in a letter of credit context in which neither the party applying for the issuance of the letter of credit nor the beneficiary of it had a lender-borrower (or debtor-creditor) relationship with the issuing bank. Also, the D'Oench doctrine was applied in In re NBW Commercial Paper Litigation, 826 F. Supp. 1448, 1465, 1467, 1470-71 (D. D.C. 1992) to bar claims outside of the lender-borrower context. Specifically, D'Oench barred claims related to the sale of commercial paper. These authorities support the position of the FDIC at oral argument that D'Oench is not limited to debtor-creditor relationships.

Moreover, in Motorcity of Jacksonville, Ltd. v. FDIC, ____ F.3d _____, 1996 WL 230052, *15-16 (11th Cir. May 8, 1996) (en banc), the Eleventh Circuit concluded that D'Oench applies to any claim, including a tort claim, that is "sufficiently intertwined" with a "regular banking transaction"; or, put slightly differently, is "related" to an ordinary banking transaction. This authority supports the position of the FDIC at oral argument that D'Oench bars the wrongful dishonor claim as well as the fraudulent misrepresentation and civil conspiracy claims because they are directly related to appellants' failure to record the whole agreement that the parties made prior to the $550,000 being transfered to Hilton Head Bank & Trust ("HHBT"). App.980-81, 982, 983-84, 876-77). That agreement is reflected in Appellants' Br. at 11-12 and called for HHBT to be responsible on a letter of credit securing the return of the $550,000 in the event the Page

PLAINTIFF'S EXHIBIT 2

surety bond was not issued. The SAFIG letter of credit was issued pursuant to the agreement and, accordingly, is directly related to, and intertwined with, it. App. 881.

Three copies of this letter and copies of the referenced authorities are included herewith. Please distribute this material to the Panel (Hamilton, Murnaghan and Merhige) at your earliest opportunity.

Very truly yours,

JEROME A. MADDEN
Counsel

cc: George Hunter McMaster
1400 Main Street, P.O. Box 7337
Columbia, South Carolina 29202

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Miami, Florida 33139

Andrew Plunkett
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Thornwell F. Sowell
Nelson Mullins Riley & Scarborough, L.L.P.
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1894-1975

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October 10, 1996

The Honorable Bert M. Montague
Clerk of Court
Fourth Circuit Court of Appeals
U.S. Courthouse Annex, Rm. 501
1100 East Main Street
Richmond, Virginia 23219

Re: Young v. FDIC, No. 95-1897

Dear Mr. Montague:

Appellant Young, by and through the undersigned counsel, hereby makes objection to Appellee FDIC's letter of October 2, 1996, which was submitted pursuant to Fed. R. App. P. 28(j).

Young's objections are:

1. Appellee FDIC improperly cited to authority cited to extensively in its Brief and submitted to the Court for consideration prior to oral argument; and

2. Appellee FDIC improperly argues its position in an attempt to amend and/or supplement its oral argument.

Respectfully submitted,

George Hunter McMaster

GHM/san

cc: Jerome A. Madden, Esquire
Brett Feinstein, Esquire
Andrew Plunkett, Esquire
Thornwell F. Sowell, Esquire

PLAINTIFF'S EXHIBIT 3

FDIC
Federal Deposit Insurance Corporation
Washington, D.C. 20429

Legal Division

October 23, 1996

BY OVERNIGHT COURIER

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OCT 28

Mr. Bert Montague, Clerk
U.S Court of Appeals
for the Fourth Circuit
1100 E. Main St., Fifth Floor
Richmond, VA 23219

Re: Young v. FDIC, No. 95-1897

Dear Mr. Montague:

One of the issues raised by appellant in this appeal is whether the Financial Institutions, Reform, Recovery and Enforcement Act ("FIRREA"), Pub. L. No. 101-73, § 101(10), 103 Stat. 187 (1989) displaced the federal common-law doctrine enunciated by the Supreme Court in D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447 (1942). By way of a Fed. R. App. P. 28(j), we previously brought to the Court's attention the Eleventh Circuit's (en banc) decision in Motorcity of Jacksonville, Ltd. v. FDIC, 83 F.3d 1317 (11th Cir. 1996). In July 1996, the plaintiffs filed a petition with the Supreme Court asking that the Court issue a writ of certiorari to review and reverse the Eleventh Circuit's decision. 65 USLW 3085, (No. 96-106) (U.S. Jul. 22, 1996).

On Friday, October 18, 1996, the FDIC filed a brief in opposition to the petition. See FDIC Br. (attached hereto). Therein, we argue that the Court should deny the petition because: 1) the alleged unwritten agreement was entered into prior to the effective date of FIRREA; 2) under the Court's analysis in Landgraf v. U.S.I. Film Products, 511 U.S. 244 (1994), sections 1821(d)(9)(A) and 1823(e) cannot be applied retroactively to pre-FIRREA transactions; and 3) accordingly, FIRREA could not have displaced the D'Oench doctrine for facts presented therein. In short, the issue was not squarely before the court of appeals.

Because the facts here also pre-date FIRREA, FIRREA could not have displaced the D'Oench doctrine for purposes of this case for the same reason.

PLAINTIFF'S EXHIBIT 4

Three copies of this letter and copies of our brief in opposition to the petition for certiorari in Motorcity are included herewith. Please distribute this material to the Panel (Hamilton, Murnaghan and Merhige) at your earliest opportunity.

Very truly yours,

JEROME A. MADDEN
Counsel

cc: All Counsel of Record

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November 7, 1996

The Honorable Bert M. Montague
Clerk of Court
Fourth Circuit Court of Appeals
U.S. Courthouse Annex, Rm. 501
1100 East Main Street
Richmond, Virginia 23219

Fax ☐ Mail ☐ Fed-Ex ☑ Hand Delivery ☐

To: Bert Young, et

FOR YOUR INFORMATION
This is a copy of a letter or document relative to a matter being handled by us on your behalf and is provided to keep you informed of developments.
You may wish to save it for your records.
TOMPKINS AND McMASTER

cc:_____

Re: Young v. FDIC, No. 95-1897

Dear Mr. Montague:

Appellant Young, by and through the undersigned counsel, hereby makes objection to Appellee FDIC's letter of October 23, 1996, supplementing its improper letter of October 2, 1996, both of which were submitted pursuant to *Fed. R. App. P.* 28(j).

Young's objections are:

1. Appellee FDIC improperly cited to authority submitted to the Court for consideration prior to oral argument;

2. Appellee FDIC improperly argues its position in its letter in an attempt to amend and/or supplement its oral argument; and

3. Appellee FDIC improperly argues its position by submitting its twenty-six (26) page brief in another action.

Rule 28(j) allows a party to submit only "... pertinent and significant authority ...", which has come to the party's attention after oral argument. The Rule specifically provides the "... letter shall be submitted without argument ..." (emphasis added).

The FDIC's letter of October 2, 1996 violated the Rule in these respects and was objected to in Plaintiffs' letter of October 10, 1996.

The FDIC's letter of October 23, 1996 improperly cites to authority previously submitted to the Court. The FDIC makes improper argument, not only in its letter, but in its brief from another action, which matter is not authority at all. The FDIC improperly submits to the Court nearly thirty (30) pages of argument, in both letter and brief format.

PLAINTIFF'S EXHIBIT 5

This constitutes a blatant violation of and disregard for the rules of this Court and an attempt to unfairly disadvantage the Plaintiffs, who have not improperly attempted to amend, supplement, or clarify their oral argument. Accordingly, Plaintiffs would request this Court to disregard such improper arguments.

Respectfully submitted,

George Hunter McMaster

GHM/san

cc: Jerome A. Madden, Esquire
Brett Feinstein, Esquire
Andrew Plunkett, Esquire
Thornwell F. Sowell, Esquire

FDIC
Federal Deposit Insurance Corporation
Washington, D.C. 20429

Legal Division

March 3, 1997

BY FEDERAL EXPRESS

Mr. Bert Montague, Clerk
U.S Court of Appeals
for the Fourth Circuit
1100 E. Main St., Fifth Floor
Richmond, VA 23219

Re: Young v. FDIC, No. 95-1897

Dear Mr. Montague:

Pursuant to Fed. R. App. P. 28(j), the Federal Deposit Insurance Corporation ("FDIC") hereby submits a statement of policy (62 F.R. 5984) issued by the FDIC on February 10, 1997, subsequent to the Court's decision in this matter on January 10, 1997. This statement sets forth the FDIC's conclusion that sections 1821(d)(9)(A) and 1823(e) (as amended by the Financial Institutions Reform, Recovery and Enforcement Act of 1989 ("FIRREA")) cannot be applied retroactively to unrecorded agreements that were allegedly entered into prior to FIRREA's effective date, August 9, 1989.

For pre-FIRREA agreements the statement provides that the FDIC will continue to rely on the D'Oench doctrine and, where appropriate, section 1823(e). For post-FIRREA agreements, however, it announces that the FDIC will rely only on section 1823(e) (as amended by FIRREA) and section 1821(d)(9)(A) to bar unrecorded agreements, including so-called no-asset agreements. Nevertheless, the background section accompanying the policy statement provides that, in the FDIC's view,

> Congress intended that sections 1823(e) (as amended by FIRREA) and section 1821(d)(9)(A) should be interpreted in a manner consistent with the policy concerns underlying the D'Oench doctrine. Accordingly, . . . these sections bar claims that do not meet the enumerated recording requirements set forth in section 1823(e), regardless of whether a specific asset is involved, to the same extent as such claims would be barred by the D'Oench doctrine.

62 F.R. at 5984.

Inasmuch as the alleged agreements in this case occurred prior to August 9, 1989, this Court's reliance on D'Oench to bar Mr. Young's claims is fully consistent with the policy statement.

PLAINTIFF'S EXHIBIT 6

Moreover, pursuant to Fed. R. App. P. 28(j), the FDIC hereby submits a copy of the Supreme Court's recent decision in Atherton v. FDIC, 117 S. Ct. 666 (1997). We do not believe that Atherton, which discussed the applicability of pre-Erie "general" federal common law, has any bearing on the Court's post-Erie D'Oench decision, which created a "special" federal common law rule of decision to protect the federal interest. Thus, D'Oench is one of those "few and restricted" circumstances mentioned in Atherton where the federal courts may develop federal rules.

Three copies of this letter and copies of the referenced policy statement and Atherton decision are included herewith. Please distribute this material to the Panel (Hamilton, Murnaghan and Merhige) at your earliest opportunity.

Very truly yours,

JEROME A. MADDEN
Counsel

Enclosures

cc: George Hunter McMaster, Esq.
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All Other Counsel of Record

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March 10, 1997

FAXED 3/10/11

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☐ C ☐ PLEAD ☐ DISC
☐ R ☐ EXH ☐ WORK
CC
INT

Mr. Robert H. Young
EDX Holdings, Inc.
10440 North Central Expressway
Suite 510, Lock Box No. 104
Dallas TX 75231-4104

RE: Robert H. Young, et al. v. Federal Deposit Insurance Corporation, as receiver for Hilton Head Bank and Trust Company, et al.
Civil Action No. D:89-1398-1

RE: Robert H. Young, et al. v. Raymond Jones, et al.
9.92-0308-1AJ

Dear Bob:

Enclosed is the brief of the FDIC.

As this brief was not requested it is improper. I will not object, however, as it is such a poor piece of work I hope the Court reads it.

Yours very truly,

George Hunter McMaster

GHM/lmd
Enclosure
cc: NS

Tell Pleroe read enclosed

PLAINTIFF'S EXHIBIT 7

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September 23, 1997

The Honorable William K. Suter
Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Re: Robert H. Young, *et al.* v. FDIC, *et al.*
No. 97-0065

Dear Mr. Suter:

Enclosed for filing and consideration, please find an original and ten (10) copies of the **Reply of Petitioners** to the Response of the Federal Respondent to Petitioners' Motion to Strike Respondents' Brief in Opposition.

Thank you for your kind assistance.

Respectfully Submitted,

George Hunter McMaster
Counsel of Record

Nelda T. Smyrl
Of Counsel

Counsel for Petitioners

NTS/abb
Enclosure

cc: Seth P. Waxman, Esq.
Andrew Plunkett, Esq.
Brett Allen Feinstein, Esq.
John Roche

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SUPREME COURT, U.S.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1996

NO. 97-0065

ROBERT H. YOUNG, *ET AL.*,

v.

FEDERAL DEPOSIT INSURANCE CORPORATION, as Receiver for Hilton Head Bank & Trust Company, N.A., *ET AL.*

CERTIFICATE OF SERVICE

I, George Hunter McMaster, do hereby certify that I have served the following attorneys or other parties named with the **Reply of Petitioners**, dated September 22, 1997, by depositing a copy of the same with the United States Postal Service, first class postage prepaid, this day, September 23, 1997, addressed as follows:

Seth P. Waxman, Esq.
Acting Solicitor General
Department of Justice
Room 5143
10th & Constitution Ave. NW
Washington, DC 20530

Mr. John Roche
Compass Management & Leasing
75 State Street, 25th Floor
Boston, Massachusetts 02109

Andrew Plunkett, Esq.
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George Hunter McMaster

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